

Harry Lunstead Designs, Inc. and Local Union No. 3-9 International Woodworkers of America, AFL-CIO, Petitioner. Case 19-RC-10133

December 10, 1983

DECISION AND ORDER

**BY CHAIRMAN VAN DE WATER AND
MEMBERS JENKINS AND HUNTER**

Pursuant to a Stipulation for Certification Upon Consent Election approved by the Acting Regional Director for Region 19 on March 13, 1981, an election by secret ballot was conducted on May 15, 1981, under his direction and supervision, among the employees in the appropriate unit. At the conclusion of the election an amended corrected tally of ballots was served on the parties¹ which showed that there were approximately 62 eligible voters and 61 cast ballots, of which 31 were cast for the Petitioner, 29 were cast against the Petitioner, and 1 was challenged. One ballot was declared void. The amended corrected tally of ballots reflected that the challenged ballot was insufficient to affect the results of the election. Thereafter, the Employer filed timely objections to the election.

Pursuant to Section 102.69 of the National Labor Relations Board Rules and Regulations, Series 8, as amended, the Acting Regional Director caused an investigation to be made of the issues raised by the objections. On August 20, 1981, the Acting Regional Director issued and duly served on the parties his "Report and Recommendation on Objections to Election and Challenged Ballot," in which he recommended that the Board overrule all of the Employer's objections, that it sustain the challenge to the ballot of voter Steve McClain, and that the Petitioner be certified as the statutory representative of the Employer's employees in the appropriate unit.² Thereafter, the Employer filed exceptions and a supporting brief, and the Petitioner filed a reply brief.

¹ A tally of ballots was served on the parties immediately following the election and a corrected tally of ballots was served on the parties on that same day, with an amended correction of that tally being served shortly thereafter.

² The Acting Regional Director's report did not contain the record of the proceeding herein as required by Sec. 102.69(g)(1)(ii) and (2) of the Board's Rules and Regulations, as amended, inasmuch as the pertinent sections thereof became effective subsequent to the issuance of such report. By letter of October 28, 1981, the Executive Secretary advised the parties of the record deficiency, and thereafter, on November 24, 1981, the Acting Regional Director filed an amendment to his report. On November 12, 1981, and in accordance with Sec. 102.69(g)(3) of the Board's Rules and Regulations, as amended, the Employer submitted to the Board certain documentary evidence previously submitted to the Acting Regional Director during the course of the investigation, but not included in the Acting Regional Director's report. We are satisfied that the requirements of the above-cited sections have been met, and that the record in this case is complete.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this case, the Board finds:

1. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

2. The Petitioner claims to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and 2(6) and (7) of the Act.

4. The parties stipulated, and we find, that the following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All production and maintenance employees employed by the Employer at its operation located in Kent, Washington, excluding all office clerical employees, professional employees, confidential employees, managerial employees, guards, supervisors as defined in the Act, and all other employees.

5. The Board has considered the entire record in this proceeding, including the Acting Regional Director's report, the exceptions, and the briefs, and hereby adopts the findings and recommendations of the Acting Regional Director only to the extent consistent herewith.³

The Employer's Objections 1 and 2 and 4 through 8 all allege that the Petitioner made material misrepresentations of fact with respect to various subjects during the course of the campaign. In Objections 1 and 2, the Employer alleges that the Petitioner made material misrepresentations of fact that its only sources of financial support were dues, initiation fees, and voluntary offerings, and also that its constitution and bylaws do not provide for fines or assessments. Objection 4 alleges that portions of one of the Petitioner's leaflets distorted the realities of union affairs, and neglected to inform employees about the dissolution, expulsion, or administration powers of the Union. Objection 5 claims that the Petitioner made a material misrepresentation of fact by stating, "No dues are paid in the I.W.A. during unemployment or time off due to illness or injury." Objection 6 involves one of

³ In the absence of exceptions thereto, we adopt, *pro forma*, the Acting Regional Director's recommendations that Objections 3 and 9 be overruled, and that the challenge to the ballot of Steve McClain be sustained. The Employer's remaining objections will be discussed *infra*.

the Petitioner's leaflets which stated, *inter alia*, that the Employer promulgated leaflets containing "lies and half-truths" designed to divert employees from the "real issues." In its Objection 7, the Employer states that "[the Petitioner] made misrepresentations that all strikers receive benefits, contrary to its By-laws that require picket registration and service." Finally, the Employer's Objection 8 involves a claim that the Union told employees that only an unfair labor practice strike could be called.

In considering, and overruling, the above-enumerated objections, the Acting Regional Director utilized, at least in part, an analysis based on *Hollywood Ceramics Company, Inc.*, 140 NLRB 221 (1962), reaffirmed in *General Knit of California, Inc.*, 239 NLRB 619 (1978). Although we agree that the Acting Regional Director properly overruled these objections, we do so based on the Board's decision in *Midland National Life Insurance Company*, 263 NLRB 127 (1982). Thus, in *Midland*, the Board returned to the principles espoused in *Shopping Kart Food Market, Inc.*, 228 NLRB 1311 (1977), and will "no longer probe into the truth or falsity of the parties' campaign statements . . . [or] set elections aside on the basis of misleading campaign statements."⁴ Accordingly, for the reasons set out above, we overrule the Employer's Objections 1, 2, 4, 5, 6, 7, and 8.

Objection 11 concerns a ballot ruled void by the Board agent conducting the election. The ballot, a reproduction of which is attached hereto as an appendix, is marked with the word "no" in each of the boxes provided. The Acting Regional Director, in agreement with the Board agent's ruling, recommended that the ballot be declared void and that Objection 11 be overruled, reasoning that the intent of the voter was unclear. Thus, the Acting Regional Director stated that "while one could argue that printing the word NO in each box indicates a clear intent by the voter, one could just as easily argue that the voter was showing dissatisfaction with each of the ballot choices." Alternatively, the Acting Regional Director opined that "the voter could even have been giving a signal to one party to the election."

We disagree. "By appearing at the polls, and by casting a marked ballot, it appears that the voter did wish to register his preference." *Gregg Moore Co., Inc.*, 178 NLRB 483, 484 (1969). By writing "no" in both boxes appearing on the ballot, we be-

lieve that the voter indicated a desire to vote against union representation and was simply emphasizing the strength of his conviction.⁵ In this regard, we find instructive the Board's decision in *Knapp-Sherrill Company*, 171 NLRB 1547 (1968), a case not cited by the Acting Regional Director, where a voter placed an "X" in the "No" box and a Spanish phrase which was clearly uncomplimentary to the Union in the "Yes" box. The Board held the ballot to be a valid "No" vote, stating that it "doubly reflects the intent of the voter." The Board in *Knapp-Sherrill* also found that the irregularly marked ballot did not "inherently disclose the identity of the voter." That finding is equally applicable to the ballot in issue here. Accordingly, and contrary to the Acting Regional Director's recommendation, we sustain the Employer's Objection 11, and count the ballot in question as a "no" vote.⁶

Our sustaining of Objection 11 alters the amended corrected tally of ballots so that the votes cast against the Petitioner now tally 30, and the number of votes cast for the Petitioner remains at 31. The issues raised by the Employer's Objection 10 must now be resolved, inasmuch as such resolution could affect the numerical outcome of the election.

⁵ While the Acting Regional Director stated that the case of *Caribe Industrial and Electrical Supply, Inc.*, 216 NLRB 168 (1975), "should be followed here," we regard it as distinguishable on its facts. The ballot declared void in that case was marked with a vertical line in the "No" square and a complete "X" in the "Yes" square.

⁶ We note that our conclusion herein is in accord with the views of the Eleventh Circuit in *The Wackenhut Corporation v. N.L.R.B.*, 666 F.2d 464 (1982), denying enforcement of 250 NLRB 1293 (1980). Thus, as that court points out, the Board's practice has been to examine the facts of each case to determine whether the voter's intent can be ascertained, and the Board has not adopted a rigid rule whereby any irregularly marked ballot is presumed ambiguous. Although that court denied the Board's petition for enforcement in that case, there was no dispute as to the mode of analysis, but only as to the conclusion to be drawn from the facts presented therein. We now adopt the court's factual conclusions in *Wackenhut*, and note that the facts of that case, indistinguishable from the facts herein, led the Eleventh Circuit to conclude that the voter in *Wackenhut* intended to vote "No."

With respect to another matter, although the issue raised by this ballot is procedurally before us by way of an objection, and although the Employer takes the position that sustaining Objection 11 would warrant setting the election aside, the effect of our holding is more in the nature of overruling a challenge to a ballot. Accordingly, even though we shall sustain this objection, we hold that the conduct of the Board agent in declaring the ballot in question to be void does not warrant setting aside the election. See, generally, *Gregg Moore Co., Inc.*, *supra*, in which the Board resolved a similar situation through the challenged-ballot procedure.

Our dissenting colleague concedes that the voter "probably" intended to vote against union representation, but nevertheless claims that the ballot does not indicate the employee's intent "with reasonable certainty." We believe that the dissent is, in the words of the *Wackenhut* court, "splitting hairs." As noted above, in *Wackenhut*, on identical facts, the court concluded that "[t]he intent of the voter . . . is free from doubt," and we agree. Accordingly, contrary to the dissent's assertion, we find our ruling in this case to be fully consistent with our recent decision in *Kaufman's Bakery, Inc.*, 264 NLRB No. 33 (1982), where we reiterated "the Board's long-established policy of attempting to give effect to voter intent whenever possible."

⁴ *Midland National Life Insurance Co.*, *supra* at 133. We note that the Board will, under *Midland*, continue to "intervene in cases where a party has used forged documents which render the voters unable to recognize propaganda for what it is" (*id.*), or "when an official Board document has been altered in such a way as to indicate an endorsement by the Board of a party to the election" (*id.* at fn. 25). We find that this case does not fall within these narrow exceptions to the Board's *Midland* holding.

Objection 10 concerns whether the Employer waived its challenge to the ballot of then employee Karen Wedde based upon alleged representations by the Board agent conducting the election that the Employer "need not 'challenge' and could appeal the matter later." The Employer contends that it would have challenged Wedde's ballot had it not been told by the Board agent that it could do so after the voting had taken place. The Acting Regional Director acknowledged that a factual dispute exists as to what occurred at the election concerning the Wedde ballot; but, as alluded to above, the Acting Regional Director found it unnecessary to resolve the matter because Wedde's ballot would not have been determinative in view of his recommendation with respect to Objection 11. We agree with the Acting Regional Director that a factual dispute exists as to Objection 10; but, in view of our disposition of Objection 11, we shall direct a hearing as to Objection 10 so that the substantial and material issues raised therein can be resolved.

ORDER

It is hereby ordered that a hearing be held before a duly designated hearing officer for the purpose of receiving evidence to resolve the issues raised by the Employer's Objection 10.

IT IS FURTHER ORDERED that the Hearing Officer designated for the purpose of conducting the hearing shall prepare and caused to be served on the parties a report containing resolutions of the credibility of witnesses, findings of fact, and recommendations to the Board as to the disposition of the above Objection 10. Within 10 days from the date of issuance of such report, either party may file with the Board in Washington, D.C., eight copies of exceptions thereto. Immediately upon the filing of such exceptions, the party filing the same shall serve a copy thereof on the other party and shall file a copy with the Regional Director. If no exceptions are filed thereto, the Board will adopt the recommendations of the Hearing Officer.

IT IS FURTHER ORDERED that the above-entitled proceeding be, and it hereby is, referred to the Regional Director for Region 19 for the purpose of conducting such hearing, and that the said Regional Director be, and he hereby is, authorized to issue notice thereof.

MEMBER JENKINS, dissenting:

I disagree with my colleagues' reversal of the Acting Regional Director's finding that the ballot involved in Objection 11 should be declared void. The ballot was marked with the word "no" in both the "Yes" and "No" boxes on the ballot. The Acting Regional Director, applying Board prece-

dent, voided the ballot concluding that although printing the word "no" in each box could indicate a clear intent by the voter, it could also indicate that the voter was showing dissatisfaction with each of the ballot choices. My colleagues reverse, stating that they believe that the voter indicated a desire to vote against union representation. Were I to speculate concerning the voter's intent, I would agree with my colleagues that the voter probably intended to vote against the Union. However, the test for counting irregularly marked ballots is not our belief of the voter's intent, but rather is whether the irregularly marked ballot indicates with reasonable certainty the employee's intent.⁷

My colleagues ignore any other possibilities concerning the voter's intent and rely on cases which not only do not support their position, but indeed may compel a contrary result. In *Gregg Moore Co., Inc.*, 178 NLRB 483 (1969), relied on by my colleagues, there were two unions on the ballot and there was a box marked "Neither" in which the voter wrote "no." The quoted excerpt from that case by my colleagues stating that "[b]y appearing at the polls, and by casting a marked ballot, it appears that the voter did wish to register his preference" is followed by the sentence: "*There are no markings in either of the boxes designating respectively Petitioner and Intervenor.*" (Emphasis supplied.) Compare that to the instant case where all the boxes were marked.

Similarly inapplicable is *Knapp-Sherrill Company*, 171 NLRB 1547 (1968), where the voter properly placed an "X" in the "No" box and wrote an uncomplimentary comment about the Union in the "Yes" box. The Board counted that as a "No" vote. Contrary to the instant case, there could be no other interpretation as to the voter's intent.

In sum, where there exists more than one reasonable interpretation of a voter's intent, the irregularly marked ballot should be voided despite the argument that one interpretation seems preferable to the other. To follow the course set by my colleagues would require the Board to play needless guessing games with voter choice. For example, it follows that they would count as a valid "Yes" vote a ballot which contains a "Yes" written in the "No" box. It is evident that the possibilities for speculation and confusion are too great to justify the Board's entering into the mindreading area. Congress has entrusted the Board with broad discretion in conducting representation elections. *N.L.R.B. v. A. J. Tower Company*, 329 U.S. 324, 330-331 (1946). We must not abuse that discretion.

⁷ See *Kaufman's Bakery, Inc.*, 264 NLRB 264 (1982).

APPENDIX

UNITED STATES OF AMERICA

National Labor Relations Board

OFFICIAL SECRET BALLOT

FOR CERTAIN EMPLOYEES OF
HARRY LUNSTEAD DESIGNS, INC.

Kent, WA

Do you wish to be represented for purposes of collective bargaining by

LOCAL UNION NO. 3-9, INTERNATIONAL WOODWORKERS OF AMERICA, AFL-CIO

MARK AN "X" IN THE SQUARE OF YOUR CHOICE

YES

NO

NO

NO

DO NOT SIGN THIS BALLOT. Fold and drop in ballot box.
If you spoil this ballot return it to the Board Agent for a new one.